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The Marriage of First Cousins Domiciled in Pennsylvania

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THE MARRIAGE OF FIRST COUSINS DOMICILED IN PENNSYLVANIA

The general rule is that each state, in matters of the contol and regulation of marriage, is sovereign and has the right to determine the marital status of its citizens under its own laws.[1] Marriage between first cousins was long considered valid under Pennsylvania common law, but today, if A and B, first cousins domiciled in Pennsylvania want to marry, they are confronted by the Act of 1901, P. L. 597 which reads in part:

> Section 1. . . .That from and after the first day of January, Anno Domini one thousand nine hundred and two, it shall be *unlawful* for any male person and female person, who are of kin of the degree of first cousins, to be joined in marriage.
>
> Section 2. All marriages contracted in violation of the provisions of the first section of this act are hereby declared *void.*

Two situations will be considered: (1) The effect of a marriage performed in Pennsylvania in violation of the act, and (2) the status of a marriage celebrated by Pennsylvania first cousin domiciliaries in a state where it is lawful.

Assume that A and B do marry in Pennsylvania. The statute in question expressly provides in section 2 that a marriage contracted in violation of the act shall be declared *void.* A void marriage is no marriage at all. There is *no penalty* attached to a violation of the act. Does all this mean that A and B may later, by their own act, separate without subsequent legal liability?[2] The answer is in the negative.

Void as used in the statute does not mean void at all, but has been interpreted to mean voidable.[3] The effect is that a marriage between first cousins contracted in Pennsylvania is, by the mere violation of the act, grounds for *divorce.* It does not matter that the party suing is not "an injured and innocent spouse."[4]

The problem becomes more complicated if A and B are married in a state where such a contract is lawful. In the case of *Schofield v. Schofield*[5] the parties

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[1] 55 C.J.S. 811.

[2] "The so-called void marriage, being in fact no legal relation, dose not require a judicial decree of nullity in order that the parties may be competent to contract in marriage. Nevertheless, in such cases the courts will make a decree on proper application and proof, as well as for the sake of the good order of society as for the quiet and relief of the injured party and the adjustment of property interests." 55 C.J.S. 921.

[3] McClain v. McClain, 40 Pa. Super. 248, (1909). Voidable; i.e., a matter for divorce, requiring a judicial decree.

[4] McClain v. McClain, 40 Pa. Super. 248, (1909).

[5] Schofield v. Schofield, 51 Pa. Super. 564, (1912).

were first cousins domiciled in Pennsylvania. *Knowing* that they could not be married lawfully in Pennsylvania, they went to Delaware where they *could* be married lawfully and performed the contract there. Thereafter they returned to Pennsylvania to live. Some time later, after two children had been born, W sued H for divorce, alleging that she and H were of "kin of the degree of first cousins," and that she was entitled to a divorce under the statute of 1901. The divorce was denied. The rule from the case *appears* to be that first cousins domiciled in Pennsylvania can circumvent the statute of 1901, P. L. 597, merely by having the marriage performed in a state where it can be celebrated lawfully.

Should this be considered an absolute rule, an automatic consequence of the application of Pennsylvania conflict of laws rules? This writer believes that it should not be given that construction. An analysis of the various factors that must be determined before any conclusion can be drawn will reveal the fallacy of accepting the rule as unqualified.

The general rule in the field of conflict of laws is that the validity of a marriage is to be decided by the law of the place where it is contracted. There are two definite exceptions to that rule, and if a marriage between first cousins domiciled in Pennsylvania is to be included in either exception, the Pennsylvania courts will not recognize the foreign law:

(1) If the marriage is incestuous, polygamous, or otherwise contrary to the laws of nature,[6] or

(2) If it is obnoxious to the *policy* embodied in the Pennsylvania law.[7]

The question of polygamy will not be considered in this discussion. Is the relationship between A and B, then, incestuous or otherwise contrary to the laws of nature? There is no statute in Pennsylvania specifically designating marriage between first cousins as incestuous, or which describes marriage between first cousins as contrary to the laws of nature. Questionable recourse may be had to the doctrine of Christianity.[8] That doctrine is based on the concept of an All-Powerful Mind described indiscriminately as God or Nature. "This law of nature being co-eval with mankind and dictated by God himself, is, of course, superior in obligation to any other. It is binding over all the globe in all countries, and at all times. . ."[9]

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[6] Schofield v. Schofield, 51 Pa. Super. 564, (1912); Commonwealth v. Custer, 145 Pa. Super. 535, 21 A. 2d 524, (1941); RESTATEMENT, CONFLICT OF LAWS, § 132.

[7] Schofield v. Schofield, 51 Pa. Super. 564, (1912); Commonwealth v. Custer, 145 Pa. Super. 535, 21 A. 2d 524, (1941); RESTATEMENT, CONFLICT OF LAWS, § 134.

[8] "That general body of rules to which it is supposed that human conduct ought to conform, even though not enforced by the direct action of the State,—rules derived from the Law of Nature or the general code of morality." CARTER, LAW; ITS ORIGIN, GROWTH AND FUNCTION, p. 6.

[9] BLACKSTONE, book i., p. 41.

The glaring defect in the doctrine of Christianity or Law of Nature in the matter of first cousin marriages is that it is in this particular too uncertain to support a definite conclusion. The states themselves offer no solution in applying this Law of Nature, as the status of a marriage of first cousins has never been universally designated incestuous or not-incestuous or otherwise contrary to the laws of nature.

Pennsylvania deliberately chose, in the Act of 1860, P. L. 382, to enumerate such degrees of relationship as it considered consanguinous and outrageous to general morality. That act was incorporated into the Penal Code of 1939 which made persons who married within the prohibited degrees of consanguinity guilty of *incest*. Yet, neither in the Act of 1860 nor in the act as incorporated into the Penal Code was there any mention made of the relationship of first cousins.

Admittedly, first cousins are closely related, but the Pennsylvania legislature has distinguished their status from that of marriages which it considers immoral. The last word in case decision is that marriage between first cousins has *never* been considered incestuous or contrary to the laws of nature in Pennsylvania.[10]

One may notice that the statute of 1901 which made it unlawful for first cousins to be joined in marriage has been considered in connection with the statute of 1815, P. L. 150 in holding that first cousin marriages are merely voidable,[11] although the statute of 1815 expressly states that it applies only to "marriages within the degree of consanguinity or affinity."[12] Any inference therefrom that such a contract is incestuous has been overcome by case decision and the declaration of the Penal Code of 1939. *Relationship*, therefore, as it is used in granting a divorce where the parties are Pennsylvania domiciliaries of "kin of the degree of first cousins" and who contracted the marriage in Pennsylvania, is used in its *broad sense* of which consanguinity and affinity are but segregated elements.

The fact that the *policy* of the statute of 1901 must be determined before foreign law will or will not be applied presents a serious obstacle. A strong public policy will prevent recognition of a marriage celebrated between Pennsylvania domiciliaries although it was lawful where contracted. No rule has ever been laid down as to the exact circumstances under which a particular marriage will be held positively to be against public policy. The term itself is almost indefinable, and its strength appears to rest on the convictions of public opinion prevalent at

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10 Schofield v. Schofield, 51 Pa. Super. 564, (1912).

11 McClain v. McClain, 40 Pa. Super. 248, (1909).

12 Act of 1815, P.L. 150: "All marriages within the degree of consanguinity or affinity, according to the table established by law, are hereby declared void to all intents and purposes, and it shall and may be lawful for the court of common pleas of this Commonwealth, or any of them, to grant *divorce* from the bonds of matrimony in such cases; . . ." See also the Act of 1929, P.L. 1237: "When a marriage has been heretofore or shall hereafter be, contracted and celebrated between two persons within the prohibited degrees of consanguinity or affinity, according to the tables established by law, it shall be lawful for either of said parties to obtain a *divorce* from the bond of matrimony in the manner hereinafter provided."

a given time.[13] As an example of the type of marriage which Pennsylvania has deemed offensive to public policy, reference may be had to the case of *Stull's Estate*.[14] H, divorced on the grounds of adultery, went with his paramour to Maryland where they were married. Although valid in Maryland, the marriage was banned by statute in Pennsylvania. It was held that the incapacity of the parties to marry extended outside of Pennsylvania and the Maryland law would not be recognized. It offended the prevailing sense of good morals of their domicile.

The case of *Schofield v. Schofield,* supra, held that the policy of the prohibitory statute of 1901 was to *discourage* marriages between first cousins, not because they are immoral or injurious to the public, but as a matter of *expediency.* From this decision it would *seem* that such a marriage is not repugnant to the public policy of Pennsylvania. However, the writer contends that this interpretation of policy should not be held absolute. The reason is this: children were involved in that case. Where final decision rests on the application of policy, all the facts and circumstances of the case are weighed. The matter of children is of strong public concern. Children should be protected. Consequently, the desire to shield them may *in itself* prove so strong as to outweigh the primary policy of a statute. Thus, it may be the strong public policy involved in the *facts* of the case itself rather than the policy decreed in the statute that leads a court to determine whether or not a marriage will be held valid.

Contrast the case of *Schofield v. Schofield* with the case of *Stull's Estate.* supra. Although the latter case did not concern first cousins, it should be noted that the reason the marriage was held invalid was because it was against "the prevailing sense of good morals in their domicile." Children *were not* involved. It may well be that if children *had* been involved, that factor alone would have proven of such strong policy that it would have provided a basis on which to uphold the marriage. Conversely, if children *had not* been present in the case of *Schofield v. Schofield,* the marriage there might have been declared unlawful.

In conclusion, it may be said that the Act of 1901, P. L. 597 prohibits the *making* of the marriage contract between first cousins in Pennsylvania. Whether or not the *status* of such a marriage will be held lawful in contracted lawfully in a foreign state depends not on the policy of the statute, but on the policy of the statute as affected by the facts of the particular case.

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[13] A. V. Dicey, LAW AND OPINION IN ENGLAND, p. 14.
[14] Stull's Estate, 183 Pa. 625, 39 A. 16, (1898).